

**EMPLOYMENT APPEALS TRIBUNAL**

APPEAL OF:

CASE NO:

UD542/2006 RP277/2006

Employee

against

Employer

under

**Redundancy Payments Acts, 1967 to 2003**  
**Unfair Dismissals Acts 1977 to 2001**

I certify that the Tribunal  
(Division Of Tribunal)

Chairman: Mr. P. Quinn BL

Members: Mr. G. Phelan  
Ms. A. Clune

heard this claim at Limerick, on the 11<sup>th</sup> day of December 2007.

Representation:

Claimant:

Mr. B. Sugrue BL

*Instructed by* Ms. T. Hills  
Solicitor,  
Brophy & Hills Solicitors,  
Abbey House, 7 Bank Place, Limerick

Respondent:

Mr. B. Kelly BL,

*Instructed by* Mr. P.J. O'Leary  
Solicitor,  
P.J. O'Driscoll & Sons, Solicitors  
73 South Mall, Cork

The determination of the Tribunal was as follows:-

The fact of dismissal was not in dispute in this case. At the hearing before the Tribunal,

the Claimant did not prosecute a case under the Redundancy Payments legislation.

The Respondent is a letting company. The Claimant commenced her employment with the Respondent as a Financial Controller or Accountant, in or about the 18<sup>th</sup> March 2003.

Although the salary details as provided by the Plaintiff in her form T1-A were not disputed by the Respondent at the hearing, the Respondent's evidence was that the Claimant was initially engaged on a full time basis in this role and that she subsequently approached the Respondent to work on a part-time basis of four half days, plus one full day, at a salary of €25,000 per annum, whereas the Claimant testified that worked in total twenty hours per week over three full days from 9.00 am - 5.00 p.m.

The Respondent's evidence was that the Claimant, in addition to being a Financial Controller for the Respondent, also oversaw the accounts of various management companies, of which the Respondent acted as agent, instead of the Respondent having to outsource the accounts of such management companies to external accountants.

The Claimant also gave evidence that she was responsible for all matters pertaining to VAT, wages, salaries, holiday pay, sick leave and creditors, as concerned the Respondent's enterprise.

The Claimant commenced her maternity leave on the 13<sup>th</sup> June 2005. The Claimant testified that she initially intended to avail of a period of eighteen weeks paid leave and further period of unpaid leave, although ultimately, she notified the Respondent of her intention to return to work at an earlier date.

Throughout this time, the Respondent had been operating out of Limerick for about five years, as well as out of other branch offices in Cork, Galway, Waterford and Kerry. The Respondent's evidence was that ultimately on the advice of its accountant, it made a decision to franchise out all of its regional offices and to re-locate its centre of operations, or "*administrative department*" to Dublin. In this regard, the Respondent gave evidence of endeavouring to secure the disposal of various regional offices after having moved the centre of its operations to Dublin in October 2005, although the "*lettings department*" of the Respondent's enterprise did remain in Limerick thereafter.

Apparently the Respondent divested itself of the Waterford office in July 2006 and ultimately the Limerick premises, in September 2006.

A Director of the Respondent gave evidence that having made the decision to re-locate its Limerick operation to Dublin, all employees in the Limerick branch were offered the opportunity of re-locating to Dublin, or of availing of the Limerick franchise. Specifically, this is alleged by the Respondent to have occurred at a meeting in the Clarion Hotel in or about the 18<sup>th</sup> July 2005 at which the Claimant and another Director of the Respondent attended.

The Director of the Respondent who gave evidence to the Tribunal on behalf of the

Respondent in relation to this case was not in attendance at this meeting and the Director of the Respondent who was in attendance at this meeting, did not appear at the hearing before the Tribunal to give evidence as to what transpired at this meeting.

The Claimant in her evidence to the Tribunal testified that the first she became aware of the Respondent having made a decision to relocate its operation from Limerick to Dublin was at this meeting with the other Director. In particular, as the Respondent's Financial Controller, the Claimant would have considered it part of her function to have had examined the business efficacy, or cost-effectiveness of any proposal to arrive at such a decision.

The Claimant testified that, at this meeting, she was advised by the Director concerned, that the Respondent was relocating from Limerick to Dublin, that her job was gone and that she was being made redundant, although the Limerick franchise was for sale, if she wished to purchase it. Having regard to the manner in which that offer to purchase the franchise was conveyed to her, the Claimant did not regard it as a serious proposal by the Respondent.

The Claimant was adamant that an opportunity for her to relocate to Dublin was never afforded to her by the Respondent. The Claimant testified that she would have readily availed of such an opportunity had it been presented to her.

The Claimant subsequently received a letter dated 26 August 2005 from the Director with whom she had met in July. In its material respects, this letter stated as follows, "*Further to our recent meeting and subsequent telephone calls, I am writing as I wish to keep you informed as best we can at this juncture. As you are aware we will shortly be relocating and amalgamating the Head Office from Limerick to Dublin for the reasons already outlined. In view of this and our lengthy discussions at our last meeting we are therefore obviously looking at a redundancy situation. We have been advised that as a result of The Maternity Protection Act, we cannot issue any formal notice until the date of the employee on maternity actual (sic) intends (sic) to return.*"

The Claimant testified that on receipt of this letter she felt that her job was gone, that she was very depressed and "*devastated basically*" The Claimant also testified that on or about the 28<sup>th</sup> or 29<sup>th</sup> October 2005, she telephoned the Director whom she had met at the Clarion Hotel and that when she notified him of her intention to return to work, he advised her that an Agent of the Respondent would call to her with her redundancy (RP50) form. The Claimant testified that on the 16<sup>th</sup> November 2005, an employee of the Respondent called to her with her wages and redundancy monies and informed her that he could give same over to her, only on condition that she signed the RP50. On that date, the Claimant signed the RP 50 form and received the sum of €3,261.42 from the Respondent by way of a "*redundancy payment*".

## **Determination**

The Director of the Respondent who met with the Claimant on the 16<sup>th</sup> July 2005 did not

attend before the Tribunal to testify as to the contents of his conversation with the Claimant at that meeting. No explanation as to the unavailability or absence of this officer for the hearing before the Tribunal was proffered by the Respondent, nor was any application made to the Tribunal for an adjournment of the hearing to facilitate his attendance. In such circumstances, the Tribunal accepts the sworn testimony of the Claimant as to what transpired at that meeting.

Accordingly, the Tribunal determines that at such meeting, the Claimant was not offered by that Director, upon the expiration of her maternity leave, any opportunity of returning to work with the Respondent, either in the "*lettings department*" of the Respondent's business which would continue to operate from the Respondent's Limerick office, or in the "*administrative department*" of the Respondent's business which would be relocating to Dublin.

Accordingly, the Tribunal determines that in breach of the provisions of the Maternity Protection Acts 1994-2004, the Respondent failed to allow the Claimant to return to her job, or to provide her with suitable alternative employment, on her return from maternity leave and in such circumstances, such failure on the part of the Respondent is deemed to be a dismissal of the Claimant.

Such a dismissal is deemed in law to be unfair unless there were substantial grounds justifying it.

The Tribunal determines that, having regard to the totality of the evidence and the surrounding circumstances and in the absence of evidence from the Director concerned, the Respondent failed to establish on the balance of probabilities that there were substantial grounds justifying the dismissal of the Claimant on grounds of redundancy.

Whilst the evidence undoubtedly demonstrated that the Respondent was re-locating the "*administrative department*" of its enterprise from Limerick to Dublin, for a redundancy situation to have existed, in respect of the Claimant's position of employment, the Tribunal considers that it would have been necessary for her function to have become redundant by reason of such re-location. That was clearly not the case here.

Indeed, the Respondent's evidence, from both a Director of the Respondent and from an employee, who was a sister of the absent Director, was that, on re-location of the "*administrative department*" to Dublin, initially and for a short period of time, the absent Director's sister herself, fulfilled the role theretofore fulfilled by the Claimant and thereafter, a Financial Controller was recruited by the Respondent. The Claimant's evidence was that, had she been offered continued employment in Dublin, she would have availed of same.

Although the Claimant gave evidence that the nature of her employment as a financial controller did not require her to work in a particular office at a particular location, with all information being channelled to her in Limerick, such that she doubted that the requirements of her position would have necessitated a permanent presence by her in

Dublin, she testified that had an offer of continued employment with the Respondent in Dublin been made to her, she would have unhesitatingly availed of same. She has a brother living there and could have made accommodation arrangements with him initially and thereafter rented accommodation if required, with a view to ultimately re-locating to Dublin, if required.

The Claimant's husband is employed as a gate-keeper with Irish Rail. The Claimant testified that the nature of his employment is such that, a permanent re-location to Dublin, should her employment with the Respondent have required same, would not have presented a difficulty for them.

Having regard to all the circumstances, to the continuance of the Claimant's function with the Respondent notwithstanding its re-location to Dublin and by reason of the failure on the part of the Respondent to make any offer of continued employment to her, or to even consider the adverse impact of the termination of employment on her, or any means by which such could be avoided or minimised, the Respondent has not on the balance of probabilities, established to the satisfaction of the Tribunal, substantial reasons, justifying the dismissal of the Claimant, as fair.

The Claimant's evidence was that from very shortly after the birth of her child on the 1<sup>st</sup> July 2005 to date, she has been suffering with post-natal depression.

Although the Claimant in her evidence before the Tribunal, purported to attribute the onset of her post-natal depression and its persistence to date, to how she was treated by the Respondent at the material time, and leaving aside altogether that no information concerning such a specific allegation had been provided by the Claimant in her statement of May 2006 which accompanied her T1-A Form as submitted to the Tribunal and to the Respondent, at the hearing before the Tribunal, there was no expert medical evidence adduced by way of testimony on her behalf, for the purpose of substantiating such a claim.

The "*medical evidence*" adduced on behalf of the Claimant consisted of a partially completed document from the Department of Social and Family Affairs certifying that the Claimant had been examined on the 10<sup>th</sup> December 2007 and in the opinion of a medical certifier was unfit for work due to post natal depression, as well as a prescription form from a Doctor, bearing a date of the 17<sup>th</sup> December 2007 and prescribing daily medication for the Claimant.

In such circumstances, the Tribunal was not satisfied that the Claimant established on the balance of probabilities, that the development of her post-natal depression and its apparent persistence to the present time, was attributable to the actions or omissions of the Respondent towards her, notwithstanding that the Claimant herself may very well believe such to be the case.

## **Redress**

As the Claimant's evidence was that from very shortly after the birth of her child on the 1<sup>st</sup> July 2005 to date, she has been suffering with post-natal depression, by her own account, she has not been available for work to date, or in a position to source alternative employment.

In such circumstances, it appears to the Tribunal that there has been no actual financial loss incurred by the Claimant, save in so far as it would appear from the terms and conditions of the Claimant's employment, as contained in the Respondent's "*Terms And Conditions Office Handbook*", (as furnished to the Tribunal) that she would have been entitled to payment of a sickness allowance as per her contract of employment with the Respondent, in respect of her post-natal depression.

By reason of the foregoing, in all of the circumstances of the case, the Tribunal determines that neither re-instatement, nor compensation would be a practical or appropriate form of redress for the Claimant.

In arriving at its determination as to the appropriate form of redress, the Tribunal notes in particular, the evidence of the Respondent, as to its satisfaction at all times with the competence, capability and conduct of the Claimant in respect of the performance of her duties, the fact that it never had a problem with the Claimant throughout the course of her employment and that as far as the testifying Director was concerned "*she would have been more than welcome to come to Dublin*".

Indeed it was also apparent to the Tribunal from the evidence of both the Claimant and the Respondent that this was not a case where trust and confidence between the parties had been irretrievably impaired. Furthermore the evidence of the Respondent's Director was that the Claimant was invariably awarded bonuses on its reviews of her performance with the Respondent.

Accordingly and having sought the views of the parties on the issue of redress and considered the submissions made in that regard, the Tribunal unanimously determines that having regard to all of the circumstances of the case, the appropriate form of redress for the Claimant is that she be re-engaged by the Respondent, either in the position which she held with it, immediately before her dismissal in November 2005, or in an alternative position, which would be reasonably suitable for the Claimant and on similar terms and conditions of employment.

Obviously, in the light of the Respondent's re-location to Dublin, the Tribunal recognises and acknowledges that the place of employment for the Claimant, may require to be at the Respondent's premises in Dublin, however, such monetary and other terms and conditions of employment for the Claimant, must not be less favourable than those previously held by her. Furthermore the Tribunal determines that by re-engagement of the Claimant, her statutory entitlements are deemed to be preserved.

However, the Tribunal recognises that in the light of the apparent unfitness of the Claimant for work at present, due to her post-natal depression, the Tribunal's award to

the Claimant of re-engagement, is conditional on the Claimant being certified of full fitness to return to work by her medical attendant, within a period of 3 months of the date of this determination and obviously the production of such certificate to the Respondent.

In the event of the Claimant being so certified by her medical attendant of full fitness to return to work, the Tribunal also determines that the Respondent, may, should it be appropriate, refer the Claimant to its own medical adviser, for an opinion as to the Claimant's fitness to return to work.

In the event of a conflict between the parties in relation to the medical evidence, the parties' medical attendants, [through the parties' solicitors] should strive to agree on the referral of the issue as a matter of urgency, to an independent Third Party medical referee for a final and binding determination on the issue and in default of agreement on the appointment of such an independent Third Party medical referee, the matter ought to be referred back to the Employment Appeals Tribunal by the parties.

In the event of such certificate of full fitness to return to work issuing from the Claimant's medical adviser as referred to above and in the event of either (i) the acceptance of same by the Respondent or (ii) the agreement of the Respondent's medical adviser with same, if applicable, the Tribunal determines that the Claimant's resumed employment with the Respondent, commence from a date no later than 1 month, from the date of such acceptance, or agreement by the Respondent, whichever first occurs.

In so far as it appears from the terms and conditions of the Claimant's employment, as contained in the Respondent's "*Terms And Conditions Office Handbook*", that the Claimant would have been entitled to payment of a sickness allowance as per her contract of employment with the Respondent, in respect of her absences from work from November 2005 to the date of this determination, the Tribunal determines that the Claimant is entitled to the receipt of same from the Respondent, as is applicable.

Furthermore, in respect of that future period until the date of her actual return to work with the Respondent, (*subject of course to her being certified of full fitness to return to work by her medical attendant, within a period of 3 months of the issue of this determination and the production of such certificate to the Respondent*) in so far as it so appears from the said terms and conditions as contained in the said handbook referred to above, the Tribunal also determines that the Claimant is also entitled to such payment of a sickness allowance as per her contract of employment with the Respondent, as is applicable.

Sealed with the Seal of the  
Employment Appeals Tribunal

This

=====

(Sgd.)

=====

(CHAIRMAN)